

Case summary

Fedorchenko and Lozenko v Ukraine

Application no: 387/03

1. Reference details

Jurisdiction: European Court of Human Rights (ECHR)

Date of Decision: 20 September 2012

Case Status: concluded

Link to full case:

[http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113119#{\"itemid\":\[\"001-113119\"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-113119#{\)

2. Facts of the case

The case was brought by two applicants who were members of the Romani community and lived in the towns of Novi Sanzghary and Zolotonosha, Ukraine. The applicants were represented by the European Roma Rights Centre (ERRC). The Respondent in the case was Ukraine.

On 28 October 2001, three men set the first applicant's house on fire and barred the door. As a result of this fire, five members of the applicants' family, including three children, died of burns and gas intoxication.

Following the fire, the first applicant approached the police and alleged that the fire had been started by police Major I. According to the first applicant, as he was leaving his house that evening he met Major I and two strangers, who threatened him, hit him and pushed him inside the house before setting the house alight. The first applicant said he told the police he believed that the attack was meant as punishment for a refusal to pay a bribe to the police. He also alleged that Major I had previously visited the house and demanded bribe money in return for not arresting one of the first applicant's relatives for drug dealing.

In the months and years that followed, a series of investigations were conducted into both the attack and the allegation of Major I's involvement. An internal inquiry into Major I's alleged involvement in the arson attack, which was conducted by the Poltava Regional Police Department, concluded on 10 December 2001 that Major I had not been involved and stated that comments he had made about Gypsies together with the head injuries sustained by the first applicant in the incident, may have explained the first applicant's "slander" of Major I. The inquiry's conclusion was sent to the Poltava Regional Prosecutor's Office.

Concurrent criminal proceedings began after the incident and lead to the arrest and charging of other suspects in connection with the arson. On 14 November 2001, one suspect, N, was charged with murder and destruction of property.

On 1 June 2002, the Prosecutor stated that as a result of the internal police inquiry's conclusions, the fact that other accused people had stated that Major I was not with them at the house and the content of the statements made by Major I himself, it would not initiate criminal proceedings against Major I.

In July 2002, the Poltava Regional Court of Appeal, considering the case against N, remitted the criminal case for further investigation, noting numerous problems and shortcomings of the

investigation which it found had been inadequate. The Supreme Court of Ukraine endorsed its view in March 2003. Despite these doubts over the case, in June 2003 the Prosecutor's Office refused to institute criminal proceedings against Major I. It claimed, without giving specific details, that further checks had been undertaken confirming that Major I was not involved in the arson attack.

In January 2005, N was found guilty of wilful destruction of property and given a five year suspended sentence. The decision was quashed in May 2005 due to procedural defects and when N died later that year, the courts terminated the criminal proceedings against him. No further criminal proceedings followed.

The applicants brought claims before the ECHR alleging that (a) their relatives had died as a result of an arson attack with direct involvement of a state agent (Major I) and (b) that the state authorities had failed to conduct a thorough and effective investigation into the circumstances of the death of their relatives and of Major I's involvement in the arson attack. In particular, they argued that the treatment they received and the state's failure to investigate was due to discrimination towards them as members of the Roma community.

As part of the hearing, the ECHR's attention was drawn to a report by the European Commission against Racism and Intolerance (ECRI) which highlighted the systematic discrimination faced by the Roma community in Ukraine:

"[T]he Roma/Gypsy population of Ukraine is faced with situations of severe socio-economic disadvantage, but also with manifestations of prejudice, discrimination and violence on the part of the majority population and sometimes on the part of the authorities."

In particular the report referred to discrimination perpetrated by the police:

"ECRI notes with concern frequent reports of excessive use of force, ill-treatment, verbal abuse and destruction of property by law enforcement personnel. Discriminatory practices are also reported to be widespread and include arbitrary checks, unwarranted searches, confiscation of documents and (...) discriminatory enforcement of crime prevention policies targeting persons with criminal records."

3. Law

Articles 2, 3 and 14 of the European Convention on Human Rights (the Convention).

4. Legal arguments

Applicants' arguments

The applicants argued that there had been breaches of both the substantive and procedural elements of the Article 2 right to life. As to the first, the applicants claimed that the attack had been organised and carried out with the participation of a state agent. As to the second, they alleged that the Respondent had not done enough to investigate the crime, and that the investigations they had undertaken were ineffective because so much information had been left out or not gathered in enough detail. For example, the applicants alleged that the police had failed to interview key witnesses. The applicants highlighted the fact that the national courts themselves had criticised the investigations for being insufficient.

The applicants went on to argue that the procedural failures under Article 2 had a discriminatory element and so were also a breach of the Article 14 freedom from discrimination. In particular, the applicants argued that they had identified evidence that the

crime was racially motivated and that the state had an obligation to investigate these allegations. They noted that, despite other similar attacks on two other Romani houses on the same day, there was no evidence that the authorities had carried out any examination into allegations that the crime had been racially motivated.

The applicants also argued that their deceased relatives had been subjected to inhuman and degrading treatment and that a number of other Articles of the Convention including Article 8, were violated.

Respondent's arguments

In relation to the accusation of the violations of Article 2, the Respondent argued that Major I had been found not to have been involved by both an internal police inquiry and by the courts. In response to the allegations that its investigations had been inadequate and ineffective, the Respondent argued that the investigation had identified those believed to have carried out the attack. The Respondent added that the authorities had done all they could to find those responsible for the attack, including carrying out reconstructions of the incident, searches, identification parades and numerous interviews and forensic examinations.

Regarding the alleged violation of Article 14, the Respondent submitted that this article applied only when the alleged violation had been committed by the state agents. As those charged with the crime were private individuals, the Respondent argued that the state could not be accused of having violated Article 14.

5. Decision

The ECHR found that the Respondent had violated both Article 2 and Article 14 (taken with Article 2) of the Convention. It held that, given this finding, it did not need to go on to deal with the substantive merits of the other allegations. It awarded damages of EUR 20,000 to the second applicant and EUR 8,000 to the ERRC to cover its costs and expenses.

Article 2

The ECHR concluded that there had indeed been a violation of the procedural limb of Article 2 of the Convention. It found that despite the Respondent's claim that numerous procedural actions had been taken, it was unsatisfied with the effectiveness of these, and it remained unclear what exactly had been examined. The ECHR paid particular attention to the findings of the Poltava Regional Court of Appeal- which had been backed up by the Supreme Court of Ukraine - noting that both courts had identified inadequacies in the authorities' investigation. The ECHR also noted the lack of evidence that the Respondent had followed up on the national courts' concerns.

Regarding the perpetrators of the crime, the ECHR found that there was no evidence to show that measures had been taken to track down the six suspects thought to be involved in the attack, and none had been captured to date. Regarding Major I, the ECHR questioned why the Prosecutor's Office had merely accepted the conclusion of the police's internal inquiry. Having listed series of investigatory shortcomings the ECHR concluded that there was a breach of the procedural aspect of Article 2.

In relation to the substantive Article 2 allegations, the ECHR held that a lack of evidence as to the involvement or otherwise of Major I in the incident, meant that it was not possible for the Court to conclude beyond reasonable doubt that there had been a violation of the substantive limb of Article 2.

Article 14

The ECHR reiterated that the state's Article 2 obligation to investigate cases of deprivation of life, must be discharged without discrimination as required by Article 14. It stated that, in the case of investigations of violent attacks, the state had an additional duty to take all reasonable steps to establish whether there was a causal link between racist attitudes and the attack on the applicants' relatives. Taking into account that two other houses in which people of Romani origin lived were burned on the night of the attack in question, alongside the documented prejudice felt towards the Roma community in Ukraine, the ECHR decided that this should have been sufficient evidence to warrant an investigation by the Respondent into whether the arson attack was racially motivated. The ECHR could find no evidence that the authorities had undertaken such an investigation, an omission on the part of the Respondent which the ECHR deemed to be "unacceptable". It therefore concluded that the Respondent had indeed violated Article 14 (taken together with Article 2) of the Convention.